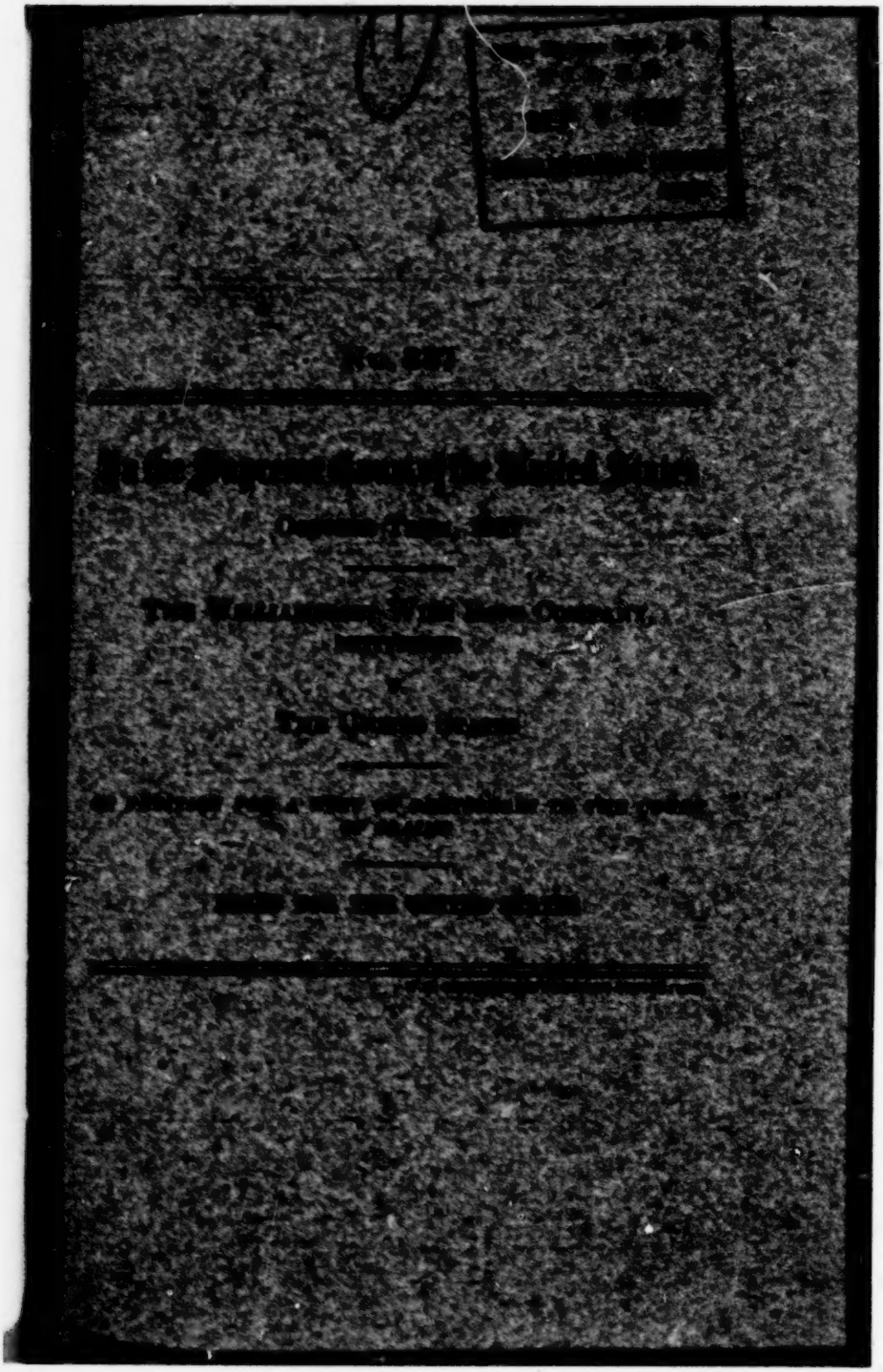


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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 337

THE WILLIAMSPORT WIRE ROPE COMPANY, petitioner

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims has not yet been officially reported, but will be found at page 24 of the Record.

JURISDICTION

The judgment of the Court of Claims was entered May 2, 1927. (R. 33.) The petition for writ of certiorari was filed June 29, 1927 (R. 32), under the provisions of the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether, under the provisions of Sections 327 and 328 of the Revenue

Act of 1918, providing for a special assessment and a special method of determining the war-profits and excess-profits tax base of certain taxpayers where the application of the ordinary statutory formula provided in said Act (Sec. 301) works exceptional hardship evidenced by gross disproportion between the tax computed without the benefit of said sections and the tax so computed, the decision of the Commissioner of Internal Revenue as to whether the special method should be granted or final or subject to review by the courts.

THE STATUTES

Sections 327 and 328 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1061, provide:

> SEC. 327. That in the following cases the tax shall be determined as provided in section 328:
>
> (a) Where the Commissioner is unable to determine the invested capital as provided in section 326;
>
> (b) In the case of a foreign corporation;
>
> (c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;
>
> (d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined

without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax computed without benefit of this section is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid

shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

(e) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress without regard to the restrictions contained in section 257.

STATEMENT

The petitioner on June 15, 1919, filed with the proper officer its return of income for the year 1918. (R. 7.) The tax liability shown by the return was duly paid. (R. 7.) Subsequently, as a result of an examination of petitioner's books, the Commissioner of Internal Revenue levied an additional assessment against the petitioner, which was paid. (R. 7, 8.)

Petitioner duly filed a claim for refund, claiming that it had a right to have its tax liability computed in accordance with Sections 327 and 328 of the Revenue Act of 1918, and was entitled to a refund of the amount by which the liability computed

under Section 301 exceeded the liability computed under Sections 327 and 328. (R. 9, 12.)

Six months having elapsed since the date of the filing of the claim for refund without any action having been taken thereon by the Commissioner of Internal Revenue (R. 13), this suit was brought.

Petitioner alleged in its petition below facts tending to qualify it under Section 327 for the special assessment outlined in Section 328. (R. 9, 12.)

The petition in the Court of Claims set forth two causes of action, the first based on the above facts, the second on other grounds. To the first cause of action the respondent demurred (R. 24), and the Court of Claims sustained the demurrer and dismissed the petition as to that item. (R. 33.)

The second cause of action has been conceded by the respondent, refund has been made, and petitioner has filed a motion to dismiss that cause of action in the Court of Claims; only the first cause of action is involved in the present application for certiorari.

ARGUMENT

It is the contention of the United States that Sections 327 and 328 of the Revenue Act of 1918, by reason of the expressions used and the nature of the subject matter dealt with, contemplated that the granting of relief to taxpayers in the form of special assessment under these sections was a matter entrusted to the discretion of the Commissioner of Internal Revenue, the only check on the exercise

of that discretion being the requirement that he should make his determination a matter of record and should, when called upon to do so, report to Congress the cases in which he had applied the special assessment provision. Looking at Sections 327 and 328, the conclusion is almost irresistible that it was the intention to entrust the decision to the Commissioner and make his decisions final. Section 327 (a) provides that the tax shall be determined under Section 328 "where the Commissioner is unable to determine the invested capital." Subdivision (c) provides that Section 328 shall be applied if "the Commissioner is unable satisfactorily to determine the respective values of the several classes of property," etc. Subdivision (d) provides that the special assessment allowed in Section 328 may be applied where, upon application by the corporation, "the Commissioner finds and so declares of record" that the tax, if determined without the benefit of this section, would work exceptional hardship, evidenced by gross disproportion between the tax computed without the benefit of the section and the tax computed by reference to the representative corporations specified in Section 328. These provisions, fairly construed, indicate that it must be the Commissioner who is unable to determine invested capital, as provided in Section 326, and it must be the Commissioner who is unable satisfactorily to himself to determine the various things provided for in Subdivision (c) of Section 327, and it must be the Commissioner

who finds and so declares of record that hardship would otherwise result, before special assessment shall be granted.

It is our belief that the decision of the Court of Claims dismissing the cause of action is sound. However, the case of *Blair, Commissioner*, v. *Oesterlein Machine Company*, No. 210, October Term, 1927, which was decided adversely to the Government in the Court of Appeals of the District of Columbia, is now pending before this Court on writ of certiorari granted May 2, 1927, and presents a question similar to that presented in this case and arising out of the same sections of the Revenue Act of 1918. The decision of this Court in that case will almost surely also determine the question here presented. Under these circumstances we believe that we would not be justified in opposing the petition for writ of certiorari.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.
GEORGE H. FOSTER,
Attorney.

SEPTEMBER, 1927.

○

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It is our belief that the decision of the Court of Claims dismissing the cause of action is sound. However, the case of *Blair, Commissioner*, v. *Oesterlein Machine Company*, No. 210, October Term, 1927, which was decided adversely to the Government in the Court of Appeals of the District of Columbia, is now pending before this Court on writ of certiorari granted May 2, 1927, and presents a question similar to that presented in this case and arising out of the same sections of the Revenue Act of 1918. The decision of this Court in that case will almost surely also determine the question here presented. Under these circumstances we believe that we would not be justified in opposing the petition for writ of certiorari.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.
GEORGE H. FOSTER,
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SEPTEMBER, 1927.

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In the Supreme Court of the United States

OCTOBER, 1927

No. 357

THE WILLIAMSPORT WIRE ROPE COMPANY, PETITIONER

v.

THE UNITED STATES

ON MOTION OF THE PETITIONER TO REVERSE AND REMAND

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 24) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered May 2, 1927. (R. 33.) The petition for writ of certiorari was filed June 29, 1927 (R. 32), and the writ was granted November 28, 1927, without opposition from the United States.

QUESTION PRESENTED

In *Blair, Commissioner, v. Oesterlein Machine Co.*, No. 210, October Term, 1927, decided November

21, 1927, this Court held that the decision of the Commissioner of Internal Revenue as to whether a taxpayer was entitled to special assessment under Sections 327 and 328 of the Revenue Act of 1918, and as to the amount of the tax computed under those sections, is not conclusive on the Board of Tax Appeals and the Board may determine for itself, from evidence before it, whether the taxpayer was entitled to the benefit of the special assessment provisions, and, if so, the amount of the tax.

The question presented here is whether the same principle applies in suits in the Court of Claims to recover taxes alleged to have been illegally assessed and collected, and whether the Court of Claims may determine from evidence before it, whether the taxpayer was entitled to special assessment, and, if so, what the correct amount of the tax is, and then render judgment for the taxpayer for the difference between the amount paid and the correct amount of the tax as determined by the court.

THE STATUTES

Sections 327 and 328 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, provide:

> SEC. 327. That in the following cases the tax shall be determined as provided in section 328:
>
> (a) Where the Commissioner is unable to determine the invested capital as provided in section 326;
>
> (b) In the case of a foreign corporation:

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which

bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of

such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress without regard to the restrictions contained in section 257.

STATEMENT

The petitioner, on June 15, 1919, filed its income-tax return for 1918, and paid a tax accordingly. (R. 7.) Subsequently, the Commissioner of Internal Revenue levied an additional assessment,

which was paid. (R. 7 and 8.) The petitioner duly filed a claim for refund, claiming it had a right to have its tax liability computed in accordance with Sections 327 and 328 of the Revenue Act of 1919, and was entitled to a refund of the amount by which the tax actually assessed and paid exceeded the tax computed under Sections 327 and 328. (R. 9–12.) Six months having elapsed from the date of filing the claim without action taken by the Commissioner (R. 13) this suit was brought. The petitioner alleged in its petition facts tending to show that the conditions existed which entitled it to special assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918. It alleged that the tax it had paid exceeded the true tax computed under Sections 327 and 328 in the sum of $100,000 (R. 12) and asked judgment for that amount (R. 15). Another cause of action was set up in the petition, but the United States has conceded that claim and refund has been made, and only the first cause of action is now involved. The United States demurred (R. 23), and the demurrer was sustained (R. 24). The decision of the Court of Claims was rendered before that in *Blair v. Oesterlein Machine Co.* The Court of Claims said (R. 30):

> The court is manifestly without authority to compute a tax under Sections 327 and 328 of the Revenue law. The Commissioner has refused to apply the sections as requested, and we have no means to compel him to do

so. Sections 327 and 328 of the statute point out the method to be pursued by the Commissioner in applying special assessment. In his office and available to him, are the facts, the records, voluminous and important, upon which the Commissioner relies in making comparisons with representative corporations engaged in a like trade or business, and upon no possible hypothesis has the court any means of knowing, in the absence of an official computation by the Commissioner, what the amount of plaintiff's tax would be under the conditions set forth in the law. Until the Commissioner has acted, and the record of his actions is before the court, we are powerless to determine that he should have done something which under the law he positively refuses to do.

The Court of Claims also said (R. 32):

In addition to what has been said, the provisions of the revenue law authorizing special assessment confer upon the Commissioner discretionary power. He is vested by Congress with the right to determine from the facts of each case when the abnormal conditions obtain to warrant the application of the law, which by its very terms indicates that only in exceptional cases is he to resort thereto. The plaintiff does not question the authority of Congress to confer the jurisdiction upon the commissioner, and does not challenge in the petition his good faith or charge abuse of discretion in refusing it classification under the special assessment sections. Plaintiff did not in the beginning

question the amount of taxes it should pay, the return made by it, and the taxes due as per the same were voluntarily paid. No complaint was lodged against the exaction until additional taxes were assessed and demanded. Then for the first time the plaintiff insists upon its alleged right to special assessment. Then and only then was the commissioner acquainted with its allegations of an abnormal status and the many unusual factors which prevented him from ascertaining invested capital under Section 326. The presumption is that the Commissioner discharged his duty under the law. In the absence of any information to the contrary, we may not presume that the Commissioner found the statutory difficulties which precluded an assessment under Section 301. On the contrary, his inaction indicates that no such difficulties were encountered. We are without jurisdiction to substitute our judgment for the Commissioner's until he exacts taxes under Sections 327 and 328 and the same are paid thereunder, and a refund asked and refused. We are without jurisdiction to award a judgment as claimed upon the court's computation of what might under the law be due. *Louisiana* v. *McAdoo*, 234 U. S. 627; *United States* v. *Babcock*, 250 U. S. 328; *Ray Consolidated Copper Co.* v. *United States*, 268 U. S. 373.

ARGUMENT

The rules of this Court contemplate motions to dismiss or affirm, but a motion to reverse and re-

mand, without giving the successful party in the lower court an opportunity to argue his case according to the rules, is a novelty. Because of the peculiar situation attending this case, we are glad to consent to having the case submitted on briefs in this way and finally disposed of, because the decision as to whether this case is controlled by *Blair* v. *Oesterlein Machine Co.* may finally dispose of it.

In the *Oesterlein Machine Co. case* the Court held that the decision of the Commissioner as to whether a taxpayer was entitled to special assessment and his decision as to the amount of the tax when computed under the special assessment provisions are not final and are subject to review by the Board of Tax Appeals, and that the Board may determine for itself whether the facts require special assessment under Sections 327 and 328 of the Revenue Act of 1918, and the Board may also determine for itself the correct amount of the tax when computed under those sections. The United States argued that case on the theory that if the Board of Tax Appeals had power to determine these questions for itself, the Court of Claims or a United States District Court sitting as a Court of Claims has like power, and in exercising jurisdiction over suits to recover taxes alleged to have been illegally assessed and collected may determine whether the taxpayer was entitled to special assessment, and if so, the right amount of the tax resulting from the application of the special assessment provisions, and grant judgment to the taxpayer for

the difference between the amount he has paid and the correct amount of tax determined in that way, if he has overpaid his true tax. It was argued by the United States in that case that the decision of the Commissioner was intended by Congress to be final because of the great practical difficulties which the Board of Tax Appeals and other judicial tribunals are confronted with if required to apply the special assessment provisions. The Court said:

> But there is no inherent impossibility or, indeed, serious difficulty in reviewing judicially any determination authorized by sections 327 and 328. The determination is to be made upon prescribed and ascertainable data and is to conform to standards set up by the statute, all defined with sufficient definiteness and clarity to be susceptible of judicial scrutiny. We can not assume that it is to be either arbitrary or unrelated to the appropriate data in the Commissioner's office, or that he is more qualified to make it than the Board established to review his decisions. An examination of the sections creating the Board and investing it with power can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character. Not only is it required by section 900 (e) to hear and determine appeals taken under section 274, which in terms allows an appeal in every case where a deficiency is found by the Commissioner, but it is empowered to administer oaths and to compel the attendance of witnesses and the production of documents and records. It

> may investigate anew the issues between the government and the taxpayer and upon the determination of the appeal it may affirm, set aside or modify the findings and decision of the Commissioner.

As we read the decision it disposes of both grounds on which the Court of Claims based its decision in the case at bar.

The Court of Claims, however, does not take that view. Its attitude has been disclosed in other similar cases pending before it. It concedes that this Court has disposed of the contention that the decision of the Commissioner of Internal Revenue is final and not reviewable, but it adheres to the view that under the statutes defining its jurisdiction the Court of Claims has no power to determine the amount of the tax under Sections 327 and 328.

We believe that as a result of the decision in *Blair* v. *Oesterlein Machine Co.*, the Court of Claims, when entertaining jurisdiction of a suit to recover taxes claimed to have been illegally or erroneously assessed, may determine for itself whether the taxpayer was entitled to special assessment, and if it concludes that he was, it may proceed to ascertain and determine the true amount of the tax computed as directed in Sections 327 and 328, and, if it appears that the tax actually paid exceeds the correct tax which the taxpayer should have been required to pay, it may award him judgment for the difference; that in passing on these matters the

Court of Claims may require the Commissioner of Internal Revenue to disclose all information in his possession, bearing on these questions, and the taxpayer may also offer evidence as in other cases, the burden being on the taxpayer to prove conditions and facts which entitle him to special assessment, and to furnish to the Court of Claims the evidence necessary to determine the true tax according to the method provided in Section 328.

We appreciate the difficulties confronting the Court of Claims, resulting from the vagueness of the formulae prescribed in Sections 327 and 328, and the character of the evidence, requiring an examination of the returns of large numbers of taxpayers in the same business, but those are matters which were presented in the *Osborne Machine Company* case and seem to have been disposed of.

Since the Court of Claims takes the view that it does of its powers and jurisdiction in these matters, it is desirable that this case be submitted for an expression of opinion by this Court on these questions. The views of the Court of Claims are clearly set forth in its opinion in this case. In order to be sure that this Court has before it a complete statement of the position taken by the Court of Claims, we present what we believe to be a fair summary of the views of the Court of Claims, as follows:

SUMMARY OF THE VIEWS OF THE COURT OF CLAIMS

The Court of Claims has no jurisdiction of tax cases as such. The Court's jurisdiction arises

under Section 145 of the Judicial Code, which authorizes a money judgment against the United States for an illegal exaction of money under a law of Congress. The Court has no power or authority over the *acts* of the Commissioner, can not control what he shall or shall not do, may not remand cases for action, either original or corrective. *Medbury v. United States*, 173 U. S. 492; *Newcomber v. United States*, 51 C. Cls. 408.

Every case heretofore involving jurisdiction of a claim arising under an Act of Congress under Section 145 of the Code clearly discloses authority of the officer to act and his erroneous application of the facts to the statute authorizing the action. *Newcomber Case, supra.*

In revenue cases the *Rock Island case*, 254 U. S. 141, points out the necessary steps to be taken before our jurisdiction attaches. The revenue law imposes the taxes, the Commissioner assesses and levies the same. The Commissioner predicates his right to the exaction under a specified section of the law. With the facts before him he proceeds under that section of the law and makes the levy. The taxpayer contests the legality of his action, pays the tax, applies for a refund; a refund is refused. Undoubtedly under the applicable sections of the law, viz, Sections 3220-3226, R. S., this Court has jurisdiction, if not barred by limitations, to pass upon the case and either award a money judgment for the

sum illegally exacted under the section of the revenue law under which the tax was levied or dismiss the petition. *Rock Island case, supra.*

If the plaintiff in this case was seeking a judgment under the facts above stated, the court has jurisdiction to proceed to judgment. The plaintiff does not seek a judgment for $383,083.53, the amount of the tax levied and paid under Section 301 of the Revenue Act of 1918; nor does he assert that if that section is applicable the tax is illegally assessed. No claim is made for the whole or any portion of the tax paid under Section 301 if that section has been correctly applied by the Commissioner. If such a claim appeared in the allegation of the petition we have jurisdiction.

Plaintiff does not assert that he is not liable for income, excess-profits, and war taxes under the revenue law. The complaint is directed toward a failure of the Commissioner, as well as a refusal, to assess his taxes under Sections 327 and 328 of the Revenue Act of 1918. The Commissioner declined to assess the taxes involved under Sections 327 and 328, *supra;* therefore, under this petition there is before the Court the single issue, i. e., was the plaintiff liable for the taxes at issue under Section 301? If not, plaintiff is entitled to a judgment for $383,083.53, with interest thereon. Either that sum, or the petition be dismissed. The Court of Claims in so holding might affirmatively say that Sections 327

and 328 were the sections of the law under which the levy should have been made; but it is assuredly without power to force the Commissioner to proceed under those sections or to ascertain the amount of the tax due thereunder.

The vital distinction lies in the fact that the plaintiff is not asking the Court to do any of the things set forth above. What the petition asks the Court to do is to first find that under Section 301 the taxes were illegally exacted; that they should have been levied under Sections 327 and 328. The Court must then find what the amount of the tax would be under Sections 327 and 328 and award judgment for the plaintiff. In other words, the Court's opinion is sought as to whether the plaintiff's liability for taxes is to be increased or diminished—not upon what the Commissioner has done, but upon what he refuses to do.

Sections 327 and 328 provide what the Commissioner shall do in making special assessments, i. e., aside from his discretionary authority to apply the law.

1. "The amount of the tax shall be the amount which bears the same ratio to the net income of the taxpayer * * * for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income * * * for such year."

2. The Commissioner in making the comparison is limited to representative corporations whose invested capital can be satisfactorily determined under Section 326, and whose gross income, net income, profits per unit of business transacted, etc., are similar from point of situation.

If the jurisdiction of the Court of Claims extends to the adjudication of the issue presented in this case and the Court should determine that the plaintiff was illegally assessed under Section 301, and Sections 327 and 328 are applicable, it then becomes the duty of the Court to ascertain the amount of the tax due under special assessment so that one may be set off against the other. That is precisely what the Court is asked to do.

By what process may this be done? The Commissioner has not made a record of facts for which the Court may issue a call under Section 164 of the Judicial Code. The Commissioner refused to do so. The record of proceedings in the Commissioner's office is not in dispute. The facts upon which he acted are available. Therefore, the only remaining resource of the Court, if special assessment is to obtain, is to issue a call for the returns made by such representative corporations as set forth in No. 2 above. The Court has authority to issue the call; but under the same section which confers the authority is the reserved right of the head of any department to refuse compliance therewith "when, in his opinion, such compliance would

be injurious to the public interest." If the head of the Department refuses, the Court is without authority to enforce compliance.

Section 257 of the Revenue Act manifestly furnishes a substantial cause for refusal.

If it should be urged that under the *Oesterlein Case* the Court may issue a subpœna *duces tecum* for the papers, the reply is that this would be the equivalent of nullifying the reservation in Section 164 of the Code and enable the Court to do indirectly what it may not do directly. If the Court may do this in a tax case, it may be done in every case of refusal, and thereby defeat the evident purpose of the reservation.

Granting, *arguendo*, the authority of the Court to obtain the files of the Commissioner with respect to representative corporations, what follows? The Court is then put in the situation where the law places the Commissioner, and instead of ascertaining whether the Commissioner has or has not correctly applied existing facts to a law of Congress, the Court, as an original proposition, assesses the tax, ascertains the difference, and renders a judgment in accord with its opinion. In other words, the Court assesses and levies the tax. The Court's jurisdiction in tax cases was stated in *United States v. Emery*, 237 U. S. 28. This case, followed by the *Rock Island Case*, 254 U. S. 141, points out the preliminary steps to be taken by a taxpayer before he may sue in this Court.

Obviously the preliminary proceedings as to Sections 327 and 328 have not been observed. The plaintiff has mistaken his forum, the Board of Tax Appeals, and the right of review accorded in the Act creating the Board.

The foregoing statement is a fairly complete statement of the lower court's reasoning.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

FEBRUARY, 1928.

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Sec. 900(a); U. S. C. Title 26, Sec. 1211 6

Sec. 900(e); U. S. C. Title 26, Sec. 1216 6

Revenue Act of 1926 (Act of Feb. 26, 1926), c. 27, Secs. 1001-1005, 44 Stat. 9, 109-111; U. S. C. App., Title 26, Secs. 1224-1228 7

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Sec. 24, as amended by the Act of Feb. 24, 1925, c. 300, 43 Stat. 972; U. S. C. Title 28, Sec. 41, Par. 20 ..... 7-8, 17

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 337

THE WILLIAMSPORT WIRE ROPE COMPANY, Petitioner

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 24) is reported in 63 C. Cls. 463.

JURISDICTION

The judgment of the Court of Claims was entered May 2, 1927. (R. 33.) The petition for writ of certiorari was filed June 29, 1927 (R. 32), and the writ was granted November 28, 1927 (R. 34), without opposition from the United States.

QUESTION PRESENTED

In *Blair, Commissioner,* v. *Oesterlein Machine Co.*, No. 210, October Term, 1927, decided November 21, 1927, this Court held that the decision of the Commissioner of Internal Revenue as to whether a taxpayer was entitled to special assessment under Sections 327 and 328 of the Revenue Act of 1918, and as to the amount of the tax computed under those sections, is not conclusive on the Board of Tax Appeals, and the Board may determine for itself, from evidence before it, whether the taxpayer was entitled to the benefit of the special assessment provisions, and, if so, the amount of the tax.

The question presented here is whether the same principle applies in suits in the Court of Claims to recover taxes alleged to have been illegally assessed and collected, and whether the Court of Claims may determine from evidence before it, whether the taxpayer was entitled to special assessment, and, if so, what the correct amount of the tax is, and then render judgment for the taxpayer for the difference between the amount paid and the correct amount of the tax as determined by the court.

THE STATUTES

Sections 327 and 328 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1093, provide:

> SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a

Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

The jurisdiction of the Board of Tax Appeals was stated in the Revenue Act of 1924, Section 900 (c. 234, 43 Stat. 253, 336, 337; U. S. C., Title 26, Secs. 1211, 1216), as follows:

> (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). The Board shall be composed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.
>
> * * * * *
>
> (e) The Board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312.

Section 274 (43 Stat. 297; U. S. C., Title 26, Secs. 1048, 1049) reads as follows:

> (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.
>
> (b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the

> amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

Sections 1001 to 1005 of the Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9, 109–111; U. S. C. App., Title 26, Secs. 1224–1228) provide for review of the decisions of the Board of Tax Appeals by a Circuit Court of Appeals or by the Court of Appeals of the District of Columbia.

The pertinent provisions of Section 145 of the Judicial Code (U. S. C., Title 28, Sec. 250) are as follows:

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims (except for pensions) founded upon * * * any law of Congress * * *.

The pertinent provisions of Section 24 of the Judicial Code, as amended by the Act of February 24, 1925, c. 309, 43 Stat. 972 (U. S. C., Title 28,

Sec. 41, par. 20), relating to the jurisdiction of the District Courts are:

> The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon * * * any law of Congress * * *.
>
> Concurrent with the Court of Claims of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, * * * or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.

Reference to the power of the Court of Claims to render judgment for any internal-revenue tax erroneously or illegally assessed or collected is found also in Section 1020 of the Revenue Act of 1924 (U. S. C. Title 28, Sec. 284), which reads as follows:

> Section 177 of the Judicial Code, as amended, is reenacted without change, as follows:
>
> "SEC. 177. No interest shall be allowed on any claim up to the time of the rendition of

judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered after the passage of the Revenue Act of 1921 against the United States for any internal revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or any sum which was excessive or in any manner wrongfully collected, under the internal revenue laws."

STATEMENT

The petitioner, on June 15, 1919, filed its income tax return for 1918, and paid a tax accordingly. (R. 7.) Subsequently, the Commissioner of Internal Revenue levied an additional assessment, which was paid. (R. 7 and 8.) The petitioner duly filed a claim for refund, claiming it had a right to have its tax liability computed in accordance with Sections 327 and 328 of the Revenue Act of 1919, and was entitled to a refund of the amount by which the tax actually assessed and paid exceeded the tax computed under Sections 327 and 328. (R. 9–12.) Six months having elapsed from the date of filing the claim without action taken by the Commissioner (R. 13), this suit was brought. The petitioner alleged in its petition facts tending to show that the conditions existed which entitled it to special assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918. It alleged that the tax it had paid exceeded the true

tax computed under Sections 327 and 328 in the sum of $100,000 (R. 12) and asked judgment for that amount (R. 15). Another cause of action was set up in the petition, but the United States has conceded that claim and refund has been made, and only the first cause of action is now involved. The United States demurred (R. 23), and the demurrer was sustained (R. 24). The decision of the Court of Claims was rendered before that in *Blair* v. *Oesterlein Machine Co.* The Court of Claims said (R. 30):

> The court is manifestly without authority to compute a tax under Sections 327 and 328 of the Revenue law. The Commissioner has refused to apply the sections as requested, and we have no means to compel him to do so. Sections 327 and 328 of the statute point out the method to be pursued by the Commissioner in applying special assessment. In his office and available to him, are the facts, the records, voluminous and important, upon which the Commissioner relies in making comparisons with representative corporations engaged in a like trade or business, and upon no possible hypothesis has the court any means of knowing, in the absence of an official computation by the Commissioner, what the amount of plaintiff's tax would be under the conditions set forth in the law. Until the Commissioner has acted, and the record of his actions is before the court, we are powerless to determine that he should have done something which under the law he positively refuses to do.

The Court of Claims also said (R. 32):

> In addition to what has been said, the provisions of the revenue law authorizing special assessment confer upon the Commissioner discretionary power. He is vested by Congress with the right to determine from the facts of each case when the abnormal conditions obtain to warrant the application of the law, which by its very terms indicates that only in exceptional cases is he to resort thereto. The plaintiff does not question the authority of Congress to confer the jurisdiction upon the commissioner, and does not challenge in the petition his good faith or charge abuse of discretion in refusing it classification under the special assessment sections. Plaintiff did not in the beginning question the amount of taxes it should pay, the return made by it, and the taxes due as per the same were voluntarily paid. No complaint was lodged against the exaction until additional taxes were assessed and demanded. Then for the first time the plaintiff insists upon its alleged right to special assessment. Then and only then was the commissioner acquainted with its allegations of an abnormal status and the many unusual factors which prevented him from ascertaining invested capital under Section 326. The presumption is that the Commissioner discharged his duty under the law. In the absence of any information to the contrary, we may not presume that the Commissioner found the statutory difficulties which precluded an assessment under Section 301. On

the contrary, his inaction indicates that no such difficulties were encountered. We are without jurisdiction to substitute our judgment for the Commissioner's until he exacts taxes under Sections 327 and 328 and the same are paid thereunder, and a refund asked and refused. We are without jurisdiction to award a judgment as claimed upon the court's computation of what might under the law be due. *Louisiana* v. *McAdoo*, 234 U. S. 627; *United States* v. *Babcock*, 250 U. S. 328; *Ray Consolidated Copper Co.* v. *United States*, 268 U. S. 373.

A motion by the petitioner to reverse was deferred until the argument.

SUMMARY OF ARGUMENT

In *Blair, Commissioner* v. *Oesterlein Machine Co.*, decided November 21, 1927, it was held that the statutes giving the Board of Tax Appeals authority to review decisions of the Commissioner of Internal Revenue on determination of deficiencies were not subject to the limitation that the decisions of the Commissioner, making or refusing special assessments under Sections 327 and 328 of the Revenue Act of 1918, were not open to review.

The question here is whether the statutes giving to the Court of Claims jurisdiction to entertain suits to recover taxes erroneously or illegally assessed or collected, read in connection with Sections 327 and 328 of the Revenue Act of 1918, deny to the court the power to review the decisions of the Commissioner under those sections. We have been un-

able to find any ground for contending that the cases are distinguishable. If the statute giving the Board of Tax Appeals general jurisdiction to review the decisions of the Commissioner on deficiencies was not subject to any qualification as to special assessments, we see no reason why the general jurisdiction of the Court of Claims to award judgment for taxes illegally or erroneously assessed or collected should be so limited. At present the decisions of the Board of Tax Appeals are reviewable in the Circuit Court of Appeals. If the decisions of the Commissioner under the special assessment sections are reviewable in the courts under that procedure, we see no reason why they should not be reviewable in the courts where the other course is followed and suit is commenced in the District Court or in the Court of Claims, for the collection of the tax alleged to have been erroneously assessed.

Notwithstanding the decision in *Blair* v. *Oesterlein Machine Company*, the Court of Claims adheres to the view that it has no jurisdiction in these special assessment cases, and it is necessary to submit the matter for the decision of this Court. The contentions of the Court of Claims are stated in this brief. The principal point seems to be that the Court of Claims can not grant relief in such cases, because the determination of the true tax under Sections 327 and 328 involves an assessment of the tax. The Court of Claims also contends that its jurisdiction to award recovery for taxes illegally collected is limited to cases where the correct see-

tion of the Revenue Act has been applied by the Commissioner, but erroneously applied, and that where, as in this case, the Commissioner has applied Section 301, which prescribes the general formula, and has refused to apply the special assessment sections, the Court of Claims may not itself determine what the true tax should have been under the special assessment sections.

ARGUMENT

In the *Oesterlein Machine Company case*, No. 210, October Term, 1927, decided November 21, 1927, this Court held that the decision of the Commissioner as to whether a taxpayer was entitled to special assessment and also his decision as to the amount of the tax when computed under the special assessment provisions are not final, and are subject to review by the Board of Tax Appeals, and that the Board may determine for itself whether the facts require special assessment under Sections 327 and 328 of the Revenue Act of 1918, and the Board may also determine for itself the correct amount of the tax when computed under those sections. The statutes defining the jurisdiction of the Board of Tax Appeals under consideration in the *Oesterlein Machine Company case* gave to the Board jurisdiction to review the decisions of the Commissioner determining deficiencies—that is, determining that the amount of tax paid was less than that owing to the United States. The statute conferring that jurisdiction contained no limitation on the

power of the Board to examine any questions of fact or of law involved in such appeals. The United States contended that the statute conferring jurisdiction should be construed in connection with certain provisions in Section 327 and 328 of the Revenue Act of 1918, which seemed to leave to the Commissioner of Internal Revenue the duty of exercising his own judgment to determine whether the ordinary formula for computing taxes could be satisfactorily applied and whether its application worked an exceptional hardship on the taxpayer as compared with "representative corporations" engaged in the same line of business. It was contended that the special assessment provisions contained words indicating that the Commissioner was to exercise his own personal judgment in these matters, and it was argued that Congress intended his judgment to be final, since the special assessment provisions were intended merely to grant relief to taxpayers from hardship, and that this argument was supported by the vagueness of the formula in Sections 327 and 328 and the difficulty which judicial tribunals would have in applying them. The Court rejected this contention and held that the matters dealt with in Sections 327 and 328 of the Revenue Act of 1918 could be reviewed judicially, and refused to read into the statute conferring jurisdiction on the Board of Tax Appeals

> an exception based on the supposedly sacrosanct character of his determinations under §§ 327 and 328.

If the statute conferring such jurisdiction on the Board of Tax Appeals is not subject to have read into it any such limitation by reason of anything contained in Sections 327 and 328 of the Revenue Act of 1918, we see no ground on which to contend that any such limitation should be read into the statutes conferring jurisdiction on the Court of Claims and on the United States District Courts sitting as courts of claims.

The jurisdiction of the Court of Claims to entertain suits by taxpayers to recover taxes erroneously or illegally assessed is based on that provision in Section 145 of the Judicial Code which gave the court jurisdiction of claims founded on Acts of Congress. *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28; *Rock Island, &c., Railroad Company* v. *United States*, 254 U. S. 141. That the jurisdiction of the court extends to entertaining suits for the recovery of and awarding of judgment for taxes "erroneously or illegally assessed or collected" has been expressly recognized by several statutes. Section 3226 of the Revised Statutes, as amended (U. S. C., Title 26, Section 156), provides that—

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected,

until a claim for refund has been filed with the Commissioner.

The amendments to Section 177 of the Judicial Code, relating to interest on judgment in the Court of Claims made by the Revenue Act of 1924, provide that—

> interest may be allowed in any judgment of any court rendered after the passage of the Revenue Act of 1921 against the United States for any internal revenue tax erroneously or illegally assessed or collected.

The provision in Section 24 of the Judicial Code, relating to the jurisdiction of the United States District Courts, states expressly that they shall have jurisdiction—

> concurrent with the Court of Claims of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected.

The statutes relating to the jurisdiction of the Court of Claims should therefore be read as if they expressly granted jurisdiction to entertain suits and award judgment for the recovery of internal revenue taxes "erroneously or illegally assessed or collected."

This suit is for the recovery of a tax which has been paid and which, it is claimed, was erroneously and illegally assessed and collected. It was claimed that it was illegally and erroneously assessed and collected because the Commissioner applied the or-

dinary formula prescribed for computing the tax contained in Section 301 when, because of the peculiar conditions affecting this taxpayer, he was entitled to have his tax assessed under the provisions of Sections 327 and 328, relating to special assessments.

If, as held in the *Oesterlein Machine Company case*, the decisions of the Commissioner refusing to apply the special assessment provisions, on the ground that the conditions did not call for such application, are not final and are subject to judicial review, then the Court of Claims has imposed upon it the task of determining whether the special assessment provisions should have been applied, because such a determination is necessary in ascertaining whether the tax which has been paid was illegally or erroneously assessed or collected. In every case in the Court of Claims for recovery of a tax alleged to have been erroneously or illegally assessed or collected the court determines what amounts has been paid and what should have been paid as the true tax imposed by law, and if the amount paid exceeds that which the court determines should have been paid it awards judgment for the difference.

A taxpayer dissatisfied with the decision of the Commissioner has the choice of taking an appeal to the Board of Tax Appeals or of paying the tax fixed by the Commissioner and bringing a suit against the United States in the Court of Claims or in the United States District Courts to recover

the amount alleged to have been erroneously or illegally assessed or collected.

Since the Revenue Act of 1926 was passed the decisions of the Board of Tax Appeals are reviewable, on the petition of either the Commissioner or the taxpayer, by Circuit Courts of Appeals or by the Court of Appeals of the District of Columbia, whose decisions, in turn, may be reviewed by this Court on certiorari, so that under the decision in the *Oesterlein Machine Company case* the decisions of the Commissioner as to whether the special assessment provisions should have been applied, and if applied what the resulting tax is, are reviewable in the courts, where the route through the Board of Tax Appeals is followed. Under the decision of the Court of Claims in this case, if, instead of taking an appeal to the Board of Tax Appeals, the taxpayer pays the tax and brings a suit in the Court of Claims or in the United States District Courts to recover the amount illegally collected, the selection of that judicial route results in preventing review in the courts of such decisions of the Commissioner, at least in so far as they refuse to apply the special assessment provisions.

Since the Court of Claims takes the view that it does of its powers and jurisdiction in these matters, it is necessary that this case be submitted for an expression of opinion by this Court.

One hundred and seventy-seven of these special assessment cases have recently been commenced and are now pending in the Court of Claims.

Others are pending in the United States District Courts. Confession of error by the United States in this one would establish no precedent to govern the Court of Claims in the others, and proper deference to the views of that court requires, in any event, that the matter be disposed of here. The views of the Court of Claims are clearly set forth in its opinion in this case. (R. 24.)

In order to be sure that this Court has before it a complete statement of the position taken by the Court of Claims we supplement the opinion with what we believe to be a fair summary of the lower court's views as follows:

SUMMARY OF THE VIEWS OF THE COURT OF CLAIMS

The Court of Claims has no jurisdiction of tax cases as such. The Court's jurisdiction arises under Section 145 of the Judicial Code, which authorizes a money judgment against the United States for an illegal exaction of money under a law of Congress. The Court has no power or authority over the *acts* of the Commissioner, can not control what he shall or shall not do, may not remand cases for action, either original or corrective. *Medbury* v. *United States*, 173 U. S. 492; *Newcomber* v. *United States*, 51 C. Cls. 408.

Every case heretofore involving jurisdiction of a claim arising under an Act of Congress under Section 145 of the Code clearly discloses authority of the officer to act and his erroneous application of

the facts to the statute authorizing the action. *Newcomber Case, supra.*

In revenue cases the *Rock Island case,* 254 U. S. 141, points out the necessary steps to be taken before our jurisdiction attaches. The revenue law imposes the taxes, the Commissioner assesses and levies the same. The Commissioner predicates his right to the exaction under a specified section of the law. With the facts before him he proceeds under that section of the law and makes the levy. The taxpayer contests the legality of his action, pays the tax, applies for a refund; a refund is refused. Undoubtedly under the applicable sections of the law, viz, Sections 3220–3226, R. S., this Court has jurisdiction, if not barred by limitations, to pass upon the case and either award a money judgment for the sum illegally exacted under the section of the revenue law under which the tax was levied or dismiss the petition. *Rock Island case, supra.*

If the plaintiff in this case was seeking a judgment under the facts above stated, the Court has jurisdiction to proceed to judgment. The plaintiff does not seek a judgment for $383,083.53, the amount of the tax levied and paid under Section 301 of the Revenue Act of 1918; nor does he assert that if that section is applicable the tax is illegally assessed. No claim is made for the whole or any portion of the tax paid under Section 301 if that section has been correctly applied by the Commissioner. If such a claim appeared in the allegation of the petition we have jurisdiction.

Plaintiff does not assert that he is not liable for income, excess-profits, and war taxes under the revenue law. The complaint is directed toward a failure of the Commissioner, as well as a refusal, to assess his taxes under Sections 327 and 328 of the Revenue Act of 1918. The Commissioner declined to assess the taxes involved under Sections 327 and 328, *supra;* therefore, under this petition there is before the Court the single issue, i. e., was the plaintiff liable for the taxes at issue under Section 301? If not, plaintiff is entitled to a judgment for $383,083.53, with interest thereon. Either that sum, or the petition be dismissed. The Court of Claims in so holding might affirmatively say that Sections 327 and 328 were the sections of the law under which the levy should have been made; but it is assuredly without power to force the Commissioner to proceed under those sections or to ascertain the amount of the tax due thereunder.

The vital distinction lies in the fact that the plaintiff is not asking the Court to do any of the things set forth above. What the petition asks the Court to do is to first find that under Section 301 the taxes were illegally exacted; that they should have been levied under Sections 327 and 328. The Court must then find what the amount of the tax would be under Sections 327 and 328 and award judgment for the plaintiff. In other words, the Court's opinion is sought as to whether the plaintiff's liability for taxes is to be increased or diminished—

not upon what the Commissioner has done, but upon what he refuses to do.

Sections 327 and 328 provide what the Commissioner shall do in making special assessments, i. e., aside from his discretionary authority to apply the law.

1. "The amount of the tax shall be the amount which bears the same ratio to the net income of the taxpayer * * * for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income * * * for such year."

2. The Commissioner in making the comparison is limited to representative corporations whose invested capital can be satisfactorily determined under Section 326, and whose gross income, net income, profits per unit of business transacted, etc., are similar from point of situation.

If the jurisdiction of the Court of Claims extends to the adjudication of the issue presented in this case and the Court should determine that the plaintiff was illegally assessed under Section 301, and Sections 327 and 328 are applicable, it then becomes the duty of the Court to ascertain the amount of the tax due under special assessment so that one may be set off against the other. That is precisely what the Court is asked to do.

By what process may this be done? The Commissioner has not made a record of facts for which the Court may issue a call under Section 164 of the Judicial Code. The Commissioner refused to

do so. The record of proceedings in the Commissioner's office is not in dispute. The facts upon which he acted are available. Therefore, the only remaining resource of the Court, if special assessment is to obtain, is to issue a call for the returns made by such representative corporations as set forth in No. 2 above. The Court has authority to issue the call; but under the same section which confers the authority is the reserved right of the head of any department to refuse compliance therewith "when, in his opinion, such compliance would be injurious to the public interest." If the head of the Department refuses, the Court is without authority to enforce compliance.

Section 257 of the Revenue Act manifestly furnishes a substantial cause for refusal.

If it should be urged that under the *Oesterlein Case* the Court may issue a subpœna *duces tecum* for the papers, the reply is that this would be the equivalent of nullifying the reservation in Section 164 of the Code and enable the Court to do indirectly what it may not do directly. If the Court may do this in a tax case, it may be done in every case of refusal, and thereby defeat the evident purpose of the reservation.

Granting, *arguendo*, the authority of the Court to obtain the files of the Commissioner with respect to representative corporations, what follows? The Court is then put in the situation where the law places the Commissioner, and instead of ascertaining whether the Commissioner has or has not cor-

rectly applied existing facts to a law of Congress, the Court, as an original proposition, assesses the tax, ascertains the difference, and renders a judgment in accord with its opinion. In other words, the Court assesses and levies the tax. The Court's jurisdiction in tax cases was stated in *United States* v. *Emery*, 237 U. S. 28. This case, followed by the *Rock Island Case*, 254 U. S. 141, points out the preliminary steps to be taken by a taxpayer before he may sue in this Court.

Obviously the preliminary proceedings as to Sections 327 and 328 have not been observed. The plaintiff has mistaken his forum, the Board of Tax Appeals, and the right of review accorded in the Act creating the Board.

The Court of Claims suggests that it may not remand the case to the Bureau of Internal Revenue or direct the Commissioner of Internal Revenue what he shall do, and believing that it may not for itself determine the true tax through the application of the special assessment provisions, it concludes that it has no jurisdiction. It is clearly right in holding that it may not remand cases to the Bureau of Internal Revenue for further action nor direct the Commissioner what action to take, but under the decision in the *Oesterlein Machine Company case* we do not see how it can be said that determining the true tax under the special assessment provisions is not a judicial function or constitutes the administrative act of making an assess-

ment. In all tax cases where judgment for amounts erroneously or illegally assessed are awarded, the Court of Claims necessarily determines for itself, through the application of the proper provisions of the Revenue Acts to the facts before it, what the correct tax should have been. The court below also suggests that its functions are limited to awarding recovery for taxes illegally assessed where the proper section was applied by the Commissioner but given a wrong application to the facts, and it is suggested that where, as in this case, the Commissioner has applied one section prescribing the general method of computing taxes when he should have applied another section of the same statute, the Court of Claims is without jurisdiction to determine whether the tax paid was illegally or erroneously assessed or collected and, if so, in what amount. We can not see that its jurisdiction to determine the amount and award judgment for taxes erroneously or illegally assessed or collected is limited to those cases where the Commissioner applies the right section but does it in an improper way. This argument of the Court of Claims may lead to the conclusion that in those cases in which the Commissioner has refused to apply special assessment sections, the Court of Claims is without jurisdiction, but in those cases in which he has applied the special assessment sections, but done so improperly, it may then review his action and determine what the true tax should have been. The *Oesterlein Machine Company case* dealt with both

of these situations and made no distinction between them.

Whether the tax was erroneously or illegally assessed or collected is to be determined by the application of any and all applicable sections of the revenue laws.

We appreciate the difficulties confronting the Court of Claims in the disposition of these cases as the result of the decision in the *Oesterlein case*. A perfect avalanche of claims arising under these special assessments has started in the Bureau of Internal Revenue and in the courts. The taxpayer, not having definite information as to returns made and taxes paid by other representative corporations in the same line of business, brings a suit in the nature of a fishing expedition, alleging, as in this case, that he was entitled to special assessment because of abnormal conditions affecting his business, resulting in hardship by comparison with other taxpayers in the same line of business, and he makes a guess at the amount which he would have saved if special assessment had been applied. This states a cause of action, and he then applies to the Court of Claims to have the returns of all corporations engaged in the same line of business brought into court for examination and comparison. As the formula prescribed by Sections 327 and 328 is not definite and exact, the cases are involved and require much time in their trial. For these reasons the Court of Claims no doubt searches for some substantial legal ground on which it may be relieved of

this task, and if its views are sound, or this Court can find any ground for distinguishing the case in principle from the *Oesterlein case*, the Bureau of Internal Revenue and the Court of Claims division of the Department of Justice will be pleased.

As yet we have been unable to devise any theory on which the reopening of these special assessment cases in the courts may be avoided, short of a reconsideration of the conclusions reached in *Blair, Commissioner*, v. *Oesterlein Machine Company*.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

APRIL, 1928.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 337.

THE WILLIAMSPORT WIRE ROPE COMPANY,
Appellant,

vs.

THE UNITED STATES,
Respondent.

BRIEF SUBMITTED WITH THE CONSENT OF THE COURT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 337.

THE WILLIAMSPORT WIRE ROPE COMPANY,
Appellant,

vs.

THE UNITED STATES,
Respondent.

Appeal From the Court of Claims.

BRIEF SUBMITTED WITH THE CONSENT OF THE COURT BY ADRIAN C. HUMPHREYS AND NEWTON K. FOX, AMICI CURIAE.

This case is one of unusual importance since it involves primarily the question of the jurisdiction of the Federal courts to review the action of the Commis-

sioner of Internal Revenue in cases of "special assessment" arising under Sections 327 and 328 of the Revenue Act of 1918.

The jurisdiction of the Court of Claims in cases arising under the internal revenue laws is provided by Section 145 of the Judicial Code, Paragraph First, as follows:

> "All claims * * * founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department * * *."

The district courts of the United States have concurrent jurisdiction with the Court of Claims under Section 24, paragraph twentieth, as follows:

> "Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States, or any law of Congress, or upon any regulation of an Executive Department * * *."

The general jurisdiction of the United States District Courts is provided by Section 24, paragraph fifth of the Judicial Code as follows:

> "Of all cases arising under any law providing for internal revenue, or for revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals." (36 Stat. L. 1092)

This court sustained the jurisdiction of the United States District Court, sitting as a Court of Claims, in a suit arising under the internal revenue laws in the

case of *United States v. Emery Bird Thayer Realty Company* (237 U. S. 28) on the ground that the claim was "founded upon" a law of Congress.

The above statutes conferring upon the Federal Courts jurisdiction in revenue cases is couched in the broadest language. Section 24, paragraph fifth, confers jurisdiction in "*all cases.*" Section 24, paragraph twentieth and Section 145 confer jurisdiction of "*all claims.*" Since the language is specific, there is no warrant for a construction which would interpret that language as meaning "some" revenue cases.

A suit to recover taxes arising under Sections 327 and 328 of the Revenue Act of 1918 is no different from any other suit to recover taxes illegally assessed and collected. The gravamen of the complaint lies in the erroneous and illegal assessment by the Commissioner of Internal Revenue of excess profits taxes under the provisions of Section 301 of the Revenue Act of 1918 instead of Section 328 by reason of which the plaintiff has paid more tax than was legally due.

Sections 327 and 328 of the Revenue Act of 1918 are relief provisions designed to alleviate the hardship in certain cases where assessment under Section 301 would result in discrimination and inequality.

When Congress passed the Revenue Act of 1918 it recognized that the harsh provisions of the War Profits and Excess Profits Tax would result in discrimination unless some exceptions were made. Congress knew that many corporations were under-capitalized due to a continued conservative practice and policy of charging capital expenditures to expense, or of writing down the value of tangible assets through excessive charges for depreciation, or carrying tangible and intangible assets at a book value or nominal cost which did not

represent the actual value. Also prior to the Excess Profits Tax a mixed aggregate of tangible and intangible assets had in many cases been paid into a corporation in exchange for its capital stock.

Congress further recognized that in many cases abnormal conditions would affect the income or capital of a corporation. Congress also realized that it would be manifestly unjust to penalize a conservative company by the harsh provisions of the Excess Profits Tax while a competitor which had either kept complete and accurate accounting records or had overvalued its assets would pay a much lower tax. Congress recognized the difficulty of examining books and records of foreign corporations and determining their invested capital.

Congress, therefore, provided that in the cases enumerated in Section 327 of the Revenue Act of 1918 the Commissioner should compute the Excess Profits Tax by a comparison with representative corporations engaged in a like or similar trade or business. The particular cases specified are as follows:

> "That in the following cases the tax shall be determined as provided in Section 328:
>
> (a) Where the Commissioner is unable to determine the invested capital as provided in Section 326;
>
> (b) In the case of a foreign corporation;
>
> (c) Where a mixed aggregate of tangible and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in Section 328."

The above provisions are just as mandatory upon the Commissioner of Internal Revenue as any of the other provisions of the Revenue Act relating to the computation and assessment of taxes. It should be noted that Section 327 provides "That in the following cases the tax shall be determined as provided in Section 328." The word "shall" is mandatory, not permissive.

Where the conditions specified in Section 327 exist, the Commissioner *must* compute the Excess Profits tax in accordance with the provisions of Section 328. If he refuses, contrary to the actual facts, to recognize that the conditions specified in Section 327 do exist, then his action is subject to review by the Federal courts.

That the question is not one of discretion reposed in the Commissioner is clearly shown by paragraph (b) of Section 327 which provides that the tax of every foreign corporation shall be computed under Section 328. Let us assume that in the case of a foreign corporation the Commissioner should compute the tax under Section 301. Would the Federal courts be powerless to correct the error of the Commissioner and require him to compute the tax under Section 328 as provided by statute?

Whether a taxpayer is entitled to special assessment under Section 328 is in last analysis only a question of fact. If the facts of the particular case bring the taxpayer within the provisions of any subdivision of Section 327, then the Commissioner must compute the tax under the provisions of Section 328. There is no discretion.

Whether a taxpayer comes within the provisions of Section 327 is just as much a question of fact as the determination of a March 1, 1913, value for the purpose of computing a gain or loss upon the sale of capital assets or the finding that a gift made within two years prior to the death of a decedent was a gift made in contemplation of death and therefore taxable as part of the gross estate. Both of these determinations by the Commissioner are subject to judicial review. In assessing taxes, the Commissioner must follow the mandatory provisions of the statute as prescribed by Congress and if he errs in the determination of a question of fact, Congress has provided in the broadest possible language that relief may be had in the Federal courts by a suit to recover the amount of taxes overpaid.

The jurisdiction of the United States Board of Tax Appeals to review the action of the Commissioner of Internal Revenue in special assessment cases arising under the provisions of Sections 327 and 328 of the Revenue Act of 1918 was recently sustained by this Court in the case of *Blair v. Oesterlein Machine Company* (48 Sup. Ct. 87). The jurisdiction of the Board of Tax Appeals is no greater than that of the Federal courts, as a matter of fact, it is more restricted.

The Court of Claims in the case at bar held that it had no jurisdiction of special assessment cases. If

this decision is sound there is no jurisdiction in any Federal court. This decision creates an anomalous situation and confers upon the Board of Tax Appeals an exclusive jurisdiction to review the action of the Commissioner in special assessment cases. Special assessment only affects taxes for the years 1917 to 1920 inclusive. The Board of Tax Appeals was not organized until June, 1924. Prior to June, 1924, the majority of special assessment cases had already been decided by the Commission of Internal Revenue and the taxpayer's only remedy was a suit in court. Under these conditions the diligent taxpayer who promptly filed his application for special assessment and had his application denied by the Commissioner prior to June, 1924, would be without a right of review or remedy. On the other hand the less diligent taxpayer who by one method or another had delayed consideration of his case until after June, 1924, would be entitled to a review of the action of the Commissioner before the Board of Tax Appeals. Certainly, jurisdiction of the courts and the right to a judicial review cannot thus depend on chance.

A great number of cases are now pending in the Federal courts seeking a review of the action of the Commissioner of Internal Revenue in special assessment cases. They arise under the various subdivisions of Section 327 of the Revenue Act of 1918.

There are cases under subdivision (a) where it is impossible to determine the invested capital under Section 326. Under this subdivision are cases where books and records have been lost or destroyed and cases where there is a wide divergence between the amount of invested capital claimed by the taxpayer and the amount allowed by the Commissioner under Section 301.

Foreign corporations assessed under subdivision (b) may be dissatisfied with the Commissioner's use of comparative concerns and computation of tax; it is certainly entitled to its day in court.

There are cases under subdivision (c) where a mixed aggregate of tangible and intangible property has been paid in for stock and bonds and the respective values of the property paid in can not be determined. Under this subdivision are cases involving the consolidations and mergers of corporations beginning about the year 1898 where assets of the merging companies were transferred in exchange for stock in the newly organized parent company.

There are a great many cases arising under subdivision (d) where various "abnormal conditions" too numerous to detail here, affect the capital or income of a corporation.

The existence of an abnormality and a resulting hardship in the rate of tax can only be determined by a review of the full record in the case.

In the case of foreign corporations the selection of proper comparatives presents a serious question. The Commissioner compiles his "representative concerns" from the simple caption on each taxpayer's income tax return; this may or may not reflect the true character of its business. Therefore, every taxpayer qualifying for assessment under Sections 327 and 328 is entitled to show what corporations are "representative corporations engaged in the same or similar business."

The Commissioner is as apt to err in the determination of facts necessary to the operation of Sections 327 and 328 as in the determinations of a March 1, 1913, value or any other fact necessary to be found in

any other type of case, and the taxpayer is, or should be, equally entitled to a judicial review of his findings.

The cases pending in the Federal courts fall into three general groups: (1) Where the Commissioner has denied that the corporation comes within the provisions of Section 327 and the taxpayer contends that it does; (2) where the Commissioner has admitted that the corporation is within the provisions of Section 327 and has made a comparison with alleged representative corporations under Section 328 but denies that such comparison results in exceptional hardship because the tax paid was not proportionately larger than that paid by corporations engaged in the same or a similar business; (3) where the Commissioner has made a comparison under Section 328 with alleged representative corporations but the taxpayer contends that improper comparatives were used and that the use of proper comparatives would result in a lower tax.

In the case at bar the Court of Claims held that Section 327 conferred upon the Commissioner of Internal Revenue discretionary powers not subject to review by the Court. Depending upon the facts of the particular case, the application of Sections 327 and 328 are as definite and certain as a computation under Section 301 which is admittedly subject to review by the courts. If the decision of the Court of Claims is affirmed the forum of the Federal courts is open in *all* revenue cases *except* special assessment cases, while the forum of the Board of Tax Appeals would be open in *all* cases. Such an interpretation of the revenue laws would result in gross discrimination and would confer upon the Commissioner of Internal Revenue an unreviewable authority and discretion never con-

templated by Congress in passing the Revenue Act of 1918 and particularly Sections 327 and 328. The taxpayer has always had a right to sue in the Federal courts for the recovery of taxes overpaid. To deny the jurisdiction of the Federal courts in special assessment cases is to deprive the taxpayer of his day in court.

Respectfully submitted,

ADRIAN C. HUMPHREYS,
NEWTON K. FOX,